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Magisterial teaching on vital conflicts: a reply to Professor Kevin Flannery

Abstract

Professor Kevin Flannery has helpfully drawn attention to some key sources for Magisterial teaching on “vital conflicts” where interventions to save a mother’s life would involve or lead to the death of her unborn child. However, former *responsa* by the Holy Office on this topic from 1884 to 1902 need to be interpreted carefully and understood in relation to the context of the time. Recent teaching has indeed clarified that the condemnation of direct abortion is *de fide*. Nevertheless, in the last forty years the Magisterium has, *de facto*, tolerated debate among faithful Catholic scholars over the ethics of craniotomy. Appeal to former Magisterial teaching is not sufficient to settle this contemporary debate over what constitutes direct abortion.

The case in question

Recent cases in Brazil,¹ the United States,² and Ireland³ have caused concern among Catholics in relation to how to resolve vital conflicts between a mother and her unborn child. These cases are very rare and typically are misreported by the media, misunderstood by the public, and exploited by lobby groups for the sake of a much wider pro-abortion agenda. Nevertheless, the possibility cannot be discounted that, in a particular case, even today and even in a technologically highly-developed country, pregnancy or childbirth may threaten the life of an expectant mother and only the premature removal of her unborn child would alleviate this threat.

The question then arises as to what authoritative Catholic teaching has to say about this kind of case. For example, would any removal of the unborn child before viability necessarily constitute “direct abortion”? If so, could such action nevertheless sometimes be justified? If such a course of action were deemed to be justifiable, would this imply that, in the most extreme circumstances, it would also be permissible to dismember or decapitate the child, or to crush or empty the child’s head (a procedure known as “craniotomy”) in order to remove him or her from the womb?

It is outside the scope of this paper to consider the handling by Church authorities of the particular cases that have generated public and ecclesial controversy in recent years. Nor does the paper explore the issue of the putative medical necessity for extraction of the unborn child in these or similar cases. The focus of this paper is purely on what the Church in her authoritative teaching has to say about interventions which aim to save the life of the mother, but which involve or lead to the death of her unborn child. Professor Kevin Flannery in a lucid and well-referenced paper, argues that the teaching of Pope’s Pius XI and Pius XII, together with three important judgements of Holy

¹ “Prelate Denounces Lack of Mercy in Brazil Abortion” *Zenit* 18 March 2009

<http://www.zenit.org/en/articles/prelate-denounces-lack-of-mercy-in-brazil-abortion>

² Jerry Filteau, “No direct abortion at Phoenix hospital, theologian says” *National Catholic Reporter* 23 December 2010 <http://ncronline.org/news/no-direct-abortion-phoenix-hospital-theologian-says>

³ William Oddie, “The tragic death of Savita Halappanavar should not be exploited to sweep away Irish abortion law, under which she could legally have been saved” *Catholic Herald* 15 November 2012 <http://www.catholicherald.co.uk/commentandblogs/2012/11/15/the-tragic-death-of-savita-halappanavar-should-not-be-exploited-to-sweep-away-irish-abortion-law-under-which-she-could-legally-have-been-saved/>

office (in 1884, 1895, and 1898) constitute a “strong and identifiable magisterial tradition”⁴ which rules out craniotomy and other such procedures as “incompatible with Church teaching”.⁵

In a number of judgments, for example, the Holy Office stated that it was not safe to teach that craniotomy is permissible, not even in circumstances where, “if it is omitted, mother and infant will die, but, if performed, the mother will be saved but the infant will die”.⁶ In a similar fashion the Holy Office condemned premature delivery before viability as well as the premature removal of an unborn child before viability, whether by caesarean section or by laparotomy (in the case of ectopic pregnancy). The Holy Office also enunciated a more general ethical principle, subsequently reiterated by Pope XI and Pope XII, that “saving the mother is a noble end, but the direct killing of the child as a means to such an end is not licit”.⁷ This paper aims to examine the authority of such pronouncements, their interpretation in their historical context, and their application to the current moral theological debate over vital conflicts.

Levels and sources of Church teaching

God gave to the Church the gift of the Holy Spirit so that she could proclaim to all the nations the truth of the gospel. It is therefore an essential mark of the Church that she teaches with authority. In a Catholic understanding, this authority was given by Christ to the apostles and then to the bishops as successors to the apostles, and especially to the bishop of Rome who maintains the unity of the college of bishops. The decree of the Second Vatican Council on the Church, *Lumen Gentium*, sets out three levels of authoritative Church teaching:

In the first place there are statements, such as the articles of the Nicene Creed, which have been solemnly declared by a pope or ecumenical council of the Church to be binding on all the faithful.

In the second place there are truths of the faith, which have not been the subject of a specific *act* of declaration, but are essential to the faith and are proclaimed in the ordinary teaching of the bishops of the Church throughout the world. These truths of the “ordinary and universal Magisterium” are also binding on the faithful. The pope may sometimes declare something to be a truth of faith where this declaration is not an act of defining dogma, but is rather an explicit recognition of what was already binding as ordinary teaching.

In the third place there are teachings of the bishops, and in particular of the pope, which are not infallible or unchangeable, but which express the faith in a particular time and place and, as such, demand of the faithful “the religious submission of mind and will” [*religiosum voluntatis et intellectus obsequium*].⁸ This phrase reflects the fact that such teaching is not only an exercise of external discipline or juridical authority but is an expression of *teaching authority* and to be received as such. Such teaching gives the faithful not only a reason to act (as the exercise of legitimate political authority gives citizens a valid reason to act) but also provides authoritative guidance about

⁴ Kevin Flannery, “Vital Conflicts and the Catholic Magisterial Tradition,” *National Catholic Bioethics Quarterly* 11.4 (Winter 2011): 691-704, at 697.

⁵ Ibid., 702.

⁶ Ibid., 699.

⁷ Ibid., 701.

⁸ Vatican Council II, *Lumen Gentium* (November 21, 1964), n. 25.

what to *believe*. The content of this teaching is evident from “the character of the documents, from [the pope’s] frequent repetition of the same doctrine, or from his manner of speaking”.⁹

The understanding provided of the Second Vatican Council has been further expounded by the Congregation for the Doctrine of the Faith (CDF) in a document on the role of a theologian within the Church, *Donum Veritatis*. This makes explicit, for example, that the Church’s teaching authority extends to moral truth as well as truths of faith.¹⁰ The document also points out that the pope is assisted in his work by the Roman curia and in particular by the CDF.¹¹ In relation to teaching that is “*per se* not irreformable”,¹² the document clarifies that while such teaching demands religious submission of mind and will, this submission is nevertheless qualified such that a theologian may raise questions about the timeliness, the form, or even the contents of the teaching. “Here the theologian will need, first of all, to assess accurately the authoritativeness of the interventions which becomes clear from the nature of the documents, the insistence with which a teaching is repeated, and the very way in which it is expressed.”¹³

The account of three levels of authoritative Church teaching also shapes the new *Profession of Faith* provided in 1998 for those who teach in Catholic theological faculties.¹⁴ The essential structural features of that profession were already explicit in *Lumen Gentium*. For the purposes of this paper, authoritative Catholic teaching is understood in the sense expounded in these documents, and in particular in *Lumen Gentium* 25.

***De fide* Catholic teaching on abortion**

In relation to the first level of Church teaching authority, as set out above, there has been no *de fide* definition on abortion. There have been statements and actions by popes and ecumenical councils in relation to abortion, but there have been no declarations which were intended, by that very act, to define the limits of Catholic doctrine.¹⁵

In relation to the second level of authority, however, it seems that there is *de fide* teaching, not based on a particular act of teaching but based on the ordinary and universal teaching of the Church. In particular, Church teaching has constantly characterised the deliberate killing of the unborn child by abortion as a grave sin.

The Church’s teaching in this area has been formed in relation to what may be called the “central case” of procured abortion, where people have recourse to procured abortion in order to dispose of an unwanted child. An unborn child may be unwanted by his or her parents for many different reasons, sometimes because of some characteristics of the child, his disability or her gender, but most frequently because of the circumstances or life-concerns of the parents. They do not wish to

⁹ Ibid., n. 25.

¹⁰ Congregation for the Doctrine of the Faith, *Donum Veritatis* (May 24, 1990), n. 16.

¹¹ Ibid., n. 18.

¹² Ibid., n. 24.

¹³ Ibid., n. 24.

¹⁴ Congregation for the Doctrine of the Faith, *Profession of Faith and Oath of Fidelity* (January 9, 1989).

¹⁵ It might be argued that John Paul II in *Evangelium Vitae* (March 25, 1995) n. 62 intended to provide a solemn definition in relation to Catholic teaching on abortion. However, careful attention to the wording of that statement shows that Pope John Paul declared this doctrine to be *de fide* on the basis of the *ordinary Magisterium*, see further below.

have a child at this time or in this situation. In the central case, it is precisely the continued existence of the child that is perceived to be the problem, and therefore the extinguishing of that life is no side-effect of the action but is the direct and deliberate intention of the abortion. It is the constant teaching of the Church that deliberate killing of the unborn child by abortion in this way is a grave moral disorder, an injustice to the child, and an act utterly incompatible with Christian charity.

There has been development in the history of the Church in relation to her structures of discipline, penance, and canon law, and these changes have affected the Church's pastoral response to abortion. The Church has not always imposed the same canonical penalty for the offence of procuring abortion.¹⁶ Similarly, the question as to the origin of the human soul and the timing of "animation" or "ensoulment" is a one that has been answered differently by theologians in different times and places. In the Middle Ages, as is well known, the common opinion among theologians was that the spiritual soul was given only after the body of the fetus was formed.¹⁷ Nevertheless, notwithstanding such variations in discipline and in theological opinion about ensoulment, the Church's teaching on the morality of abortion in the central case has been constant.¹⁸

This constant teaching is recalled in a document of the CDF in 1974 which states that "the tradition of the Church has *always* held that human life must be protected and favoured from the beginning".¹⁹ One of the earliest witnesses to this tradition is the *Didache*, a Christian work from the early second century, where it is stated that "You shall not kill by abortion the fruit of the womb and you shall not murder the infant already born".²⁰ The CDF document produces a long succession of witnesses to the same teaching, ending with a quotation from Pope Paul VI, who declared that the teaching of the Church on this matter "has not changed and is unchangeable".²¹

The authority of the Church's teaching on abortion was reiterated and clarified by Pope John Paul II in the encyclical *Evangelium Vitae*. The language of this statement makes it clear that the pope regards this teaching as *de fide*, not on the basis of a particular declaration, but on the basis of the ordinary Magisterium (Pope John Paul II cites *Lumen Gentium* 25 precisely on this point).

Therefore, by the authority which Christ conferred upon Peter and his Successors, in communion with the Bishops - who on various occasions have condemned abortion and who in the aforementioned consultation, albeit dispersed throughout the world, have shown unanimous agreement concerning this doctrine - I declare that direct abortion, that is, abortion willed as an end or as a means, [*sive uti finem intentum seu ut instrumentum*]

¹⁶ John Connery, *Abortion: The development of the Roman Catholic Perspective* (Chicago: Loyola University Press, 1977).

¹⁷ David Albert Jones, *The Soul of the Embryo: An enquiry into the status of the human embryo in the Christian tradition* (London: Continuum, 2004); David Albert Jones "Thomas Aquinas, Augustine and Aristotle on 'delayed animation'", *The Thomist* (2012) 76:1-36.

¹⁸ David Albert Jones, "Aquinas as an advocate of abortion?: The appeal to 'delayed animation' in contemporary Christian ethical debates on the human embryo", *Studies in Christian Ethics* February 2013, 26(1):97-124; David Albert Jones et al. "A Theologians Brief On the place of the human embryo within the Christian tradition and the theological principles for evaluating its moral status" *Ethics and Medicine* 17, 3, Fall 2001: 143-153. Jones *Soul of the Embryo*, 236-251; Connery *Abortion*, 304-313.

¹⁹ Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion* (November 18, 1974), n. 6, emphasis added.

²⁰ *Declaration on Procured Abortion* n. 6 quoting *Didache* V.2.

²¹ *Declaration on Procured Abortion* n. 7 quoting Paul VI "Salutiamo con paterna effusione," (December 9, 1972).

always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being [*deliberata existat innocentis hominis occisio*]. This doctrine is based upon the natural law and upon the written Word of God, is transmitted by the Church's Tradition and taught by the ordinary and universal Magisterium.²²

The definition of abortion in this key paragraph closely reflects that given earlier in the encyclical: “procured abortion is the deliberate and direct killing [*deliberata est ac directa hominis occisio*], by whatever means it is carried out, of a human being in the initial phase of his or her existence, extending from conception to birth”.²³ This definition reflects that given by the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law in 1988. Abortion is not only the expulsion of the immature fetus but is also “the killing of the fetus in any way and at any time from the moment of conception” [*de eiusdem fetus occisione quocumque modo et quocumque tempore a momento conceptionis procuretur*].²⁴ It is important to note that the *de fide* teaching of the ordinary magisterium is framed, at least in the first instance, in relation to abortion in the central case, that is, abortion which involves the deliberate and direct killing of an unborn child. This is how the term “direct abortion” is defined and understood in *Evangelium Vitae*.²⁵

When we move from the central case to the morality of interventions which aim to save a mother’s life, but which involve or lead to the death of her unborn child, the issues are more complex. To understand the teaching of the Church in this area it is necessary first to set out elements of the history of the tradition and then to consider specific Magisterial statements within the context of that history.

Vital conflicts between mother and child in Catholic thought

Whereas the Church’s teaching about abortion in the central case has been constant throughout Christian history, the same cannot be said in relation to interventions where the aim is to resolve a vital conflict between mother and child. In relation to such cases, there has been and continues to be a complex and developing discussion among faithful Catholic theologians. Furthermore, in contrast to the Jewish rabbinic tradition, interventions which aim to save a mother’s life, but which involve or lead to the death of her unborn child, were not discussed during the most important formative period of the Catholic tradition. Such cases are not mentioned by any of the Church

²² John Paul II, *Evangelium Vitae* (March 25, 1995) n. 62.

²³ *Evangelium Vitae*, n. 58. This formulation is presented as a definition of abortion disclosing “the reality of things” in contrast to the use of “ambiguous terminology... which tends to hide abortion's true nature and to attenuate its seriousness”.

²⁴ Pontifical Commission for the Authentic Interpretation of the Code of Canon Law, Canon 1398 (May 23, 1988).

²⁵ To this it may be objected that the phrase “abortion willed as an end or as a means” (*Evangelium Vitae*, n. 62) echoing an earlier use of this phrase by the CDF in 1974, itself quoting Pope Pius XII) implies that intentional expulsion of the child from the womb before viability would count as “direct abortion” because it is an act which brings about the death of the child is “willed as a means” even if the death of the child is not “willed as an end”. However, if Pope John Paul II is here defining the word direct [*recta / directa*] in relation to intention “that is, *willed* as an end or as a means” (emphasis added) then this seems equally to apply to the phrase “direct killing”. If this is the case, then the definition of procured abortion given by the encyclical “the deliberate and direct killing... of a human being in the initial phase of his or her existence” (n. 58) would apply only to intentional acts of killing, that is, to acts which not only foresee but intend the death of the child, whether as an end or as a means. Acts which intend to expel the child and which foresee but do not intend the death of the child would not fall under this definition of abortion.

fathers (with the exception of an obscure passage in Tertullian²⁶) nor is there discussion of such cases in any of the works of theologians of the high Middle Ages.

A detailed account of the Catholic tradition on these vital conflicts, from the time it eventually emerged until the mid-twentieth century, has been provided by John Connery in his study of the history of Catholic thought on abortion.²⁷ The outlines of his account are summarised here only to set out the historical context for understanding the various interventions of the Church's Magisterial on the issue. According to Connery, there was no discussion of abortion to save a mother's life published by any Catholic scholar until the middle of the fifteenth century. The first example Connery gives is Saint Antoninus of Florence, though Antoninus was drawing on an unpublished work by fellow Dominican, John of Naples composed a century before.²⁸

Antoninus and John of Naples defended the view that it is morally acceptable for a physician deliberately to procure an abortion to save the mother's life, if the fetus has not yet received a rational soul (which was thought to occur when the body was "formed" which was placed at around forty days for males and later for females). However, if the soul had been received or if it was uncertain whether the soul been received, then deliberate abortion would not be morally acceptable. The position that abortion to save a mother's life may be permissible, if done prior to ensoulment, was the dominant opinion in the fifteenth and early sixteenth century and was prominently defended in the seventeenth century by Thomas Sanchez.²⁹ Furthermore, this position was not condemned by the Church before the nineteenth century by which time it had become redundant as by then most theologians had come to think that ensoulment occurred at conception, in which case there simply was no possibility of abortion prior to this point.³⁰

It was the Franciscan Antoninus of Corduba in the mid-sixteenth century who introduced a distinction that was to have an enduring impact within the Catholic tradition on vital conflicts between mother and unborn child. Corduba argued that if an intervention was in itself health-giving [*salutifera*], having the immediate effect improving the health of the woman, and if it were needed to save the woman's life, then it could be used even if it had the side-effect of causing a miscarriage. In contrast, if the means used were in themselves deadly [*mortifera*], directly causing the death of

²⁶ Tertullian *De Anima* 25, see Jones *Soul of the Embryo*, 178, Connery *Abortion*, 41-42.

²⁷ Connery *Abortion*. Prior to this work others had provided overviews of the history for example Germain Grisez, *Abortion: The Myths, the Realities and the Arguments* (New York: Corpus Books, 1970), John T. Noonan, "An Almost Absolute Value in History", in John T. Noonan (ed.), *The Morality of Abortion: Legal and Historical Perspectives* (Cambridge, MA: Harvard University Press, 1970), and Charles Curran, "Abortion: Its Legal and Moral Aspects in Catholic Theology", in Charles Curran, *New Perspectives in Moral Theology* (Notre Dame, IN: Fides, 1974). These drew on an earlier generation of scholars such as Roger Huser, *The Crime of Abortion in Canon Law, Canon Law Studies* 162 (Washington, DC: Catholic University of America, 1942), J. Delmille, "Avortement", in R. Naz (ed.), *Dictionnaire de droit canonique* (Paris: Latouzey et Ane, 1938), and A. Chollet, "Animation", in A. Vacant and E. Mangenot (eds.), *Dictionnaire de theologie Catholique* (Paris: Latouzey et Ane, 1903). However, Connery is by far the most comprehensive. Jones *Soul of the Embryo* provides more on the biological, theological and ecclesial context of this intellectual history, but specifically on the history of discussion of vital conflicts within the Catholic tradition prior to 1950, Connery *Abortion* has yet to be excelled.

²⁸ *Ibid.*, 114-116.

²⁹ *Ibid.*, 143-141.

³⁰ John Connery, "Grisez on Abortion" *Theological Studies* Vol. 31, No. 1 (1970): 173: "to my knowledge there was no explicit condemnation of therapeutic abortion in the Church until the end of the nineteenth century. By this time, however, theories of delayed animation had already given way to the findings of modern biology and embryology."

the child, then they were not permissible.³¹ John de Lugo later developed Corduba's distinction to emphasise not the immediacy of the causality but rather the intention.³² According to this view, abortion was "direct" and always impermissible when it was *directly intended* but indirectly causing a miscarriage might sometimes be justified where this was an unintended or accidental side-effect of a good action.

In the seventeenth century most Catholic theologians agreed that, in extreme circumstances, it could be morally acceptable to cause a miscarriage if this were an indirect and unintended effect of a life-saving action. Direct abortion was allowed, if at all, only before animation. Connery is only able to find one seventeenth century example, a French Jesuit called Theophile Raynaud, who explicitly argued in favour of direct abortion of an ensouled fetus to save the life of the mother.³³ His argument was on the basis that the child could be classified as an unjust aggressor so that abortion would be analogous to killing in self-defence.

In the nineteenth century most theologians held that "direct abortion" was never permissible, though a minority held that direct abortion to save a mother's life could be justified on the grounds of self-defence. The latter part of the century was dominated by controversy concerning what counted as "direct abortion". Antonio Ballerini defended the position that inducing early delivery (*acceleratio partus*) before viability need not involve the intention to kill. Connery summarises this position by saying that Ballerini distinguished between "direct abortion and direct killing".³⁴ However, it seems doubtful that Ballerini would have been happy to call *acceleratio partus* "abortion" (or "direct abortion" or "therapeutic abortion"). His view, if I understand it correctly, was that it did not fall under the definition of abortion if it was not directed to bringing about the death of the child. The removal of the child from the womb may be deliberate, but where there is no intention to kill, Ballerini seems to have held that it would be misleading to call the procedure an "abortion".

Around the same time Daniel Viscosi argued that even craniotomy need not involve the intention to kill. The doctor's intention in crushing the head was simply to remove the child from the womb. Viscosi argued that this position followed logically from the acceptance of *acceleratio partus*. However, Ballerini denied that acceptance of *acceleratio partus* implied acceptance of craniotomy and other immediate physical assaults on the child.

As a result of a number of interventions by the Holy Office (discussed below), Catholic moral theologians of the early twentieth century no longer defended *acceleratio partus* or craniotomy. In this period the debate shifted to the question of how to treat ectopic pregnancy. In 1933 an American Jesuit called T. Lincoln Bouscaren argued that removing the fallopian tube which included the ectopic embryo was not a "direct" attack on the child and could therefore be morally acceptable

³¹ Connery *Abortion*, 125.

³² Connery *Abortion*, 175-180.

³³ Connery *Abortion*, 163, "No other author of his time or previous periods suggested this, at least regarding the animated fetus".

³⁴ Connery *Abortion*, 219, see a similar remark (in John Connery "Abortion and the duty to preserve life", *Theological studies*. 40.2 (1979): 318-333) that Ballerini "argued that therapeutic abortion did not involve direct killing".

if it were necessary in order to save the life of the mother.³⁵ This position was defended on the analogy with removing a cancerous womb when the woman happened to be pregnant.

Connery ends his history in 1950, however debate over vital conflicts continued in the second half of the twentieth century. The Second Vatican Council (1963-1965) encouraged theologians to move beyond the forms and methods of theology dominant in the late nineteenth and early twentieth century and to renew theology by a return to the sources, by attentiveness to experience, and by dialogue with other traditions. At the same time a culture shift was occurring within Western society away from the perceived restrictions of traditional mores, especially in relation to sexual morality. This context encouraged theologians to question the Church's traditional teaching on a range of moral issues such that, when Paul VI reaffirmed Church condemnation of contraception in *Humanae Vitae* in 1968, a number of theologians explicitly dissented from his teaching.

What united many dissenters and faithful theologians and philosophers in the period that followed *Humanae Vitae* was a common belief that the dominant forms of moral theology and philosophy practiced in the late nineteenth and early twentieth century had been in need of renewal.³⁶ This critical evaluation of Catholic moral thought in the period immediately prior to the Second Vatican Council was expressed not only by theologians and philosophers but also by dicasteries of the Holy See. A good example would be the comment of the Congregation for Education in 1976, "In the past, moral theology exhibited at times a certain narrowness of vision and some lacunas. This was due in large part to a kind of legalism, to an individualistic orientation, and to a separation from the sources of Revelation."³⁷ Indeed, a dissatisfaction with the state of moral theology seems to be implied by the call from the Second Vatican Council for moral theology to be "renewed through a more living contact with the mystery of Christ" and for its scientific exposition to be "nourished more on the teaching of the Bible".³⁸

Among those who dissented from *Humanae Vitae*, many followed a new method in moral theology termed proportionalism.³⁹ This method was revisionist in that it allowed consequences sometimes

³⁵ T. Lincoln Bouscaren, *Ethics of Ectopic Operations* (Chicago: Loyola University Press, 1933).

³⁶ See German Grisez, *The Way of the Lord Jesus Volume I: Christian Moral Principles* (Chicago IL: Franciscan Herald Press, 1983), 1.F.1, "Most Catholic moral theologians would agree in general with the criticisms of classical moral theology outlined above." See also John Mahoney *The Making of Moral Theology* (Oxford: Oxford University Press, 1987), chapter 7; Richard McCormick, "Moral Theology 1940-1989: An overview" in Charles Curran and Richard McCormick eds. *The Historical Development of Fundamental Moral Theology in the United States*, (New York: Paulist Press, 1999); Charles Curran, "The Role and Function of the Scriptures in Moral theology" reprinting in Charles Curran and Richard McCormick eds. *Moral Theology No. 4: The Use of Scripture in Moral theology* (New York: Paulist Press, 1984); Servais Pinckaers *The Sources of Christian Ethics* (Edinburgh: T&T Clark, 1995), Chapter 13; David Albert Jones. "John Paul II and Moral Theology" in Gerald O'Collins and Michael Hayes (eds.) *The Legacy of Pope John Paul II* (London: Continuum, 2008).

³⁷ Congregation for Education *On the Formation of Future Priests*, (February 22, 1976) n. 96, quoted by Servais Pinckaers, "The Use of Scripture and the Renewal of Moral Theology: the Catechism and *Veritatis Splendor*" *The Thomist* 59 (1995): 1-19.

³⁸ Vatican Council II, *Optatam Totius* (October 28, 1965) n. 16

³⁹ Proportionalism was the self-designation of a school that flourished in 1970s and 1980s but was condemned under that name in John Paul II, *Veritatis Splendor* (August 6, 1993) nn. 71-81. For two different views on whether the characterisation of proportionalism in *Veritatis Splendor* is accurate see Richard McCormick "Some early Reactions to *Veritatis Splendor*" *Theological Studies* 55 (1994): 481-506 and in contrast William E. May, "Pope John Paul II's Encyclical *Veritatis Splendor* And Bioethics" in C. Tollefsen *Pope John Paul II and*

to “outweigh” traditional moral prohibitions. It had great relevance for the question of vital conflicts because it effectively dissolved the distinction of directly intended effects and foreknown but unintended effects. Within a proportionalist methodology vital conflicts should be resolved by securing the best consequences, by whatever means. Indeed, not only did proportionalism justify abortion to save a mother’s life, but where the child was unlikely to survive, abortion would seem to be justifiable for a broad range of reasons, including social and personal reasons.

Within the Anglophone world, perhaps the most prominent critics of proportionalism have been Germain Grisez and John Finnis and the new school of moral analysis sometimes termed the New Natural Law Theory.⁴⁰ Whereas proportionalists dissented from the current teaching of the Magisterium, Grisez, Finnis, and others who followed them have been faithful to the Magisterium, not only in relation to *Humanae Vitae* but in their attitude to the Magisterium more generally. Furthermore, in contrast to proportionalism, Grisez is able to provide a defence of the binding character of absolute moral prohibitions, including the prohibition on “direct killing” of the innocent.⁴¹

In relation to vital conflicts, Grisez and Finnis absolutely reject the directly intended killing of the unborn child even for the sake of saving the life of the mother. Nevertheless, in 1970 Germain Grisez defended the view that craniotomy in the context of a vital conflict could be characterised as unintended killing⁴² and hence, in the language of the tradition, may not be “direct abortion”. Grisez’s account of craniotomy is similar to that given by Viscosi in the late nineteenth century, except that Grisez places craniotomy in the context of a generalised and detailed account of intention and action. Grisez clarified his arguments in 1993⁴³ and also in an important joint article with John Finnis and Joseph Boyle in 2001.⁴⁴ The Finnis-Grisez-Boyle defence of craniotomy has been much disputed by other Catholic moral philosophers and theologians, but craniotomy has recently been defended, on different grounds (on the basis of a form of virtue theory), by another non-dissenting, non-censured Catholic scholar Martin Rhonheimer.⁴⁵

As the period since the Second Vatican Council has seen a revival in discussion of the ethics of craniotomy so it has also seen further debate on methods of treating ectopic pregnancy. The predominant opinion of Catholic moral theologians from the 1930s to the Second Vatican Council was that removing the tube together with the embryo was licit, but theologians typically held that removing the embryo alone was “direct killing” and was not licit. This opinion is now increasingly

Bioethics (Dordrecht: Kluwer Academic Publishers (Philosophy and Medicine Series), 2003). On a curious historical parallel to this reaction see Jones “John Paul II and Moral Theology” 106, n. 25.

⁴⁰ Christopher O. Tollefsen “The New Natural Law Theory” on *Natural Law, Natural Rights, and American Constitutionalism* (<http://www.nlnrac.org>)

⁴¹ See for example Germain Grisez, *The Way of the Lord Jesus Volume II: Living A Christian Life* (Chicago IL: Franciscan Herald Press, 1993), 8.B.

⁴² Germain Grisez *Abortion: The Myths, the Realities, and the Arguments* (New York and Cleveland: Corpus Books, 1970), 341, “However, if it were impossible to prevent the mother’s death (or, worse, the death of both) except by cutting up and removing the child piecemeal, it seems to me that this death-dealing deed could be done without the killing itself coming within the scope of intention.”

⁴³ Grisez, *Living A Christian Life* 8.D.3.d

⁴⁴ John Finnis, Germain Grisez, and Joseph Boyle “‘Direct’ and ‘Indirect’: A Reply to Critics of Our Action Theory,” *The Thomist*, 65 (Jan. 2001): 1–44.

⁴⁵ Martin Rhonheimer, *Vital Conflicts in Medical Ethics: A virtue approach to craniotomy and tubal pregnancy* (Washington DC: Catholic University of America, 2009).

questioned. In particular it is argued by some that surgery to “scoop out” the embryo but leave the tube intact (salpingostomy) is not morally different to removing the tube (salpingectomy). It is also argued, by some, that the drug methotrexate causes the ectopic embryo to be expelled and on this basis should be regarded as morally equivalent to salpingostomy.⁴⁶ It should however be noted that some of the theologians or philosophers who would permit use of methotrexate are critical of Grisez’s moral theory and would not follow him in regarding craniotomy as morally permissible in certain cases.

The period since the Second Vatican Council has thus seen a divergence between dissenting schools of moral theology or philosophy (some subsequently censured) and non-dissenting, non-censured schools, and also a divergence between different non-dissenting schools. Among the most prominent non-dissenting schools, those who follow the approach developed by German Grisez and John Finnis have explicitly defended the permissibility of craniotomy while others have defended the use of methotrexate for ectopic pregnancy. It should nevertheless be noted that there is no consensus in favour of these conclusions. They are matters of dispute among faithful Catholic philosophers and theologians.

Magisterial interventions on abortion and vital conflicts

Magisterial interventions on the issue of abortion in vital conflict situations cover four periods: 1679, 1884-1902, 1930-1952, and 1968-2009. Flannery primarily discusses the middle two periods, but it is helpful to put these in a wider context including teaching prior to the nineteenth century and subsequent to the Second Vatican Council.

It is noteworthy that in the seventeenth century, in the context of a vigorous debate about whether “direct abortion” is ever permissible, the Holy Office did not condemn all direct abortion *per se* nor even did it condemn all direct abortion after ensoulment. Rather, within a list of sixty-five “laxist” propositions, it condemned only two concerning abortion:

[34] It is permissible to procure abortion before the ensoulment of the foetus lest the girl known to be pregnant be killed or disgraced.

[35] It seems probable that all foetuses in the womb lack a rational soul and that they first begin to have one when then are born. Consequently it must be said that abortion never involves homicide.⁴⁷

The first proposition was apparently defended by Torreblanca, but it was associated with Thomas Sanchez in as much as several theologians argued that it followed from his position.⁴⁸ The second

⁴⁶ For example Benedict M. Ashley, Jean deBlois, Kevin D. O'Rourke, *Health Care Ethics: A Catholic Theological Analysis Fifth edition* (Washington: Georgetown University Press, 2006), 82; William E. May *Catholic Bioethics and the Gift of Life second edition* (Huntington, IN: Our Sunday Visitor, 2008), 199–202; Kaczor, “The Ethics of Ectopic Pregnancy: A Critical Reconsideration of Salpingostomy and Methotrexate,” *Linacre Quarterly* 76.3 (August 2009): 265–282.

⁴⁷ Holy Office *Errores varii de rebus moralibus* (March 4, 1679); Connery *Abortion*, 189; Jones *Soul of the Embryo*, 183.

⁴⁸ Connery “Grisez on Abortion”, 173, takes issue with Grisez and Noonan for ascribing this view to Sanchez and this is one of the misapprehensions he seeks to correct this in his book *Abortion* (135-137). Curran “Abortion” is clear that this view of Torreblanca should not be attributed to Sanchez (176).

proposition, that the rational soul is given at birth, was defended by John Marcus, physician general of the Kingdom of Bohemia.

Both propositions have relevance for the issue of vital conflicts. The first concerns abortion where the threat to life is indirect and external and is not immediately a matter of health or disease. The abortion conforms to what this paper has termed the “central case” of procured abortion: abortion in order to dispose of a child (the child’s death willed as a means in order to prevent scandal and avoid danger of being killed). The second proposition is relevant to vital conflicts if one accepts the position of Antoninus of Florence (as many seventeenth century theologians did) that direct abortion may be permissible if it is done before ensoulment but not after this point. Though neither condemnation rules out direct abortion prior to ensoulment to overcome an immediate and internal health-threat to the mother, the effect of the condemnations was to encourage the view that direct abortion is never morally acceptable. By the nineteenth century this had become the dominant view among Catholic philosophers and theologians.

The second set of Magisterial interventions, three of which Flannery describes in detail, concerned whether craniotomy, *acceleratio partus* and surgery for ectopic pregnancy necessarily involve “direct abortion”. In 1869 the Sacred Penitentiary had responded to a query about craniotomy with the advice to consult the guidance of well-tested and reliable theologians (*auctores probati*).⁴⁹ Subsequent to this ambiguous response there followed fifteen years of heated debate among Catholic moral theologians as to whether craniotomy and/or *acceleratio partus* were morally acceptable. This debate was brought to the attention of the Holy Office and resulted in a series of five responses (in 1884, 1889, 1895, 1898, and 1902). It is useful to take them in order.

The first, and in many ways the most significant,⁵⁰ was on 31 May 1884 in response to a question from the Cardinal Archbishop of Lyons, “May it safely be taught in Catholic schools that craniotomy is permissible when otherwise both mother and fetus will perish, but with the operation, although the child will perish, the mother’s life will be saved?”⁵¹

The response of the Holy Office was clear: “It cannot safely be taught”. *Tuto doceri non posse*.

Following this a series of six cases were presented by the Archbishop of Cambrai to which a response was given on 19 August 1889.⁵² Rather than treat each of the cases individually the Holy Office reiterated the teaching on craniotomy (referring back to the 1884 decision) and articulated the principle that this prohibition applies to any surgical operation that directly kills the fetus or the mother, *quamcumque chirurgicam operationem directe occisivam foetus vel matris gestantis*.

This decision raised the question as to whether inducing delivery before viability “directly kills”. The Archbishop of Cambrai presented to the Holy Office the case of a physician who induced delivery of a fetus before viability in order to save a mother’s life, but who took care not to use means that would themselves be lethal (for example craniotomy or dismemberment). Could a physician

⁴⁹ Sacred Penitentiary (September 2, 1869), see Connery *Abortion* 226.

⁵⁰ A significance recognised at the time for example in the Supplement to *The Tablet* January 17, 1885. 33, “Decisions of Roman Congregations: Craniotomy”.

⁵¹ Holy Office (May 31, 1884), *Acta Sanctae Sedis* (henceforth ASS) 17, 556, see Connery *Abortion*, 284.

⁵² Holy Office (August 19, 1889), ASS 22, 748.

perform such an operation in such circumstances? On 24 July 1895, the Holy Office responded: “Negatively, in accord with the other decrees of 28 May 1884 and 19 August 1888.”⁵³

This 1895 decision was further clarified in a response of 4 May 1898, to which Pope Leo XIII gave his assent. On this occasion the question had three parts: concerning premature deliver; concerning abortion and caesarean section; and concerning surgery in the case of ectopic pregnancy. The Holy Office responded that *acceleratio partus* is licit if done for sufficient reason, but only if it is done in such a way as to consider the life of the mother and the fetus *matris et foetus vitae consulatur*. Procuring abortion is excluded, according to the decree of 1895, and caesarean section is acceptable only if done when the child is viable. Similarly surgery to remove an ectopic fetus from the mother (*laparotomia*) may be licit, but only if, as far as possible, the lives of both mother and fetus are carefully and opportunely preserved *et foetus et matris vitae serio et opportune provideatur*.⁵⁴

The qualification “as far as possible” (*quantum fieri potest*) led to the 1898 decision being read in opposite ways. If it was not in fact possible to preserve both the lives of mother and unborn child, was it allowed to tolerate the death of the child in order better to preserve the life of the mother? To resolve this ambiguity the Holy Office revisited the issue of ectopic pregnancy. On 20 March 1902 the Holy Office responded to the question whether it was licit to remove an ectopic fetus from the mother while the fetus was immature, which the question defined as being under six months of gestational age. The answer was, “Negatively, in accord with the decree of 4 May 1898, by which the lives of the fetus and mother, as far as possible, are carefully and opportunely preserved.”⁵⁵

During the third period of Magisterial interventions, from 1930 to 1951, Pope Pius XI and Pope Pius XII reiterated the principle that direct killing of the unborn child is not permissible even for the sake of saving the mother’s life. In 1930 in the encyclical *Casti connubii*, Pius XI specifically rejected accounts of the “therapeutic indication” for abortion which appeal to the idea of defending oneself against an unjust aggressor, (an argument, it may be noted, that had previously had some currency within the Catholic tradition). The unborn child is not an unjust aggressor and direct killing of the innocent (*directam innocentis necem*) is contrary to the commandment of God. At this point Pius XI cited three of the decisions of the Holy Office (1898, 1895 and 1884).⁵⁶ Similarly, in 1951 Pius XII repeated the principle that “the direct deliberate disposition of an innocent human life, that is to say, a disposition that aims at its destruction either as an end or as a means to another end” is never permissible.⁵⁷ Pius XII explicitly distinguishes such “direct killing” from those cases where “saving the life of the future mother, independently of her condition of pregnancy, urgently required a surgical procedure or another therapeutic application, which would have as an accessory

⁵³ Holy Office (July 24, 1895), ASS 28, 383-384. Note that the dates that this response gives for previous responses are inaccurate, and should be 31 May 1884 and 19 August 1889. Flannery reproduces this response as it appears in AAS (see Flannery “Vital Conflicts”, 700, n. 25), whereas in Denzinger, the 1889 date is corrected (Karl Rahnher (Henry Denzinger) *Enchiridion Symbolorum* ed. 29 (Friburg: Herder, 1953), 1890a).

⁵⁴ Holy Office (May 4, 1898), ASS 30, 703-704.

⁵⁵ Holy Office (March 20, 1902), ASS 35, 162.

⁵⁶ Pius XI *Casti Connubii* (December 31, 1930), n. 64 footnote, see *Acta Apostolicae Sedis* 22, 563, n.1. Flannery gives the dates for these responses as 1897, 1895 and 1884 (Flannery “Vital Conflicts”, 699, n. 21). The mistaken reference to 1897 rather than 1898 seems to reflect a mistake in the note given in the English translation (see note 52 for the English translation of *Casti Connubii* on the Vatican website). The note in AAS 22, 563 has 1898, 1895 and 1884.

⁵⁷ Pius XII Allocution to Italian midwives (October 29, 1951) as quoted by Flannery, “Vital Conflicts,” 701.

consequence, in no way desired or intended, but inevitable, the death of the fetus, such an action could not be called a direct attack on the innocent life”.⁵⁸

The decisions of the Holy Office and the declarations of Pius XI and Pius XII constitute strong Magisterial support for the principle that direct and intentional killing of the unborn child is never morally acceptable, even when this would be the only available means to save the life of the mother. This constitutes an important clarification of doctrine as this principle had not always been universally agreed or clearly articulated in the Catholic tradition in previous centuries. It may be noted that John Paul II in declaring Catholic teaching on abortion to be *de fide*, uses the same language of “direct abortion” and “direct killing”.

What is much less clear, however, is the proper application of these Magisterial statements to the question of what *constitutes* direct killing of the unborn child. The summary of Connery seems fair: the Catholic scholars defending craniotomy, or defending *acceleratio partus*, caesarean section or laparotomy prior to viability, sought to persuade Church authorities that such actions were only indirectly lethal. It was “their failure to do this convincingly that led to the condemnations of their opinions”.⁵⁹ Nevertheless, this succinct summary of events immediately raises an obvious question: might other theologians arguing differently and working in a different context, be more convincing in making such a case?

In this regard it should be noticed that already in the 1930s there was a significant development in Catholic understanding of vital conflicts in this area. The Holy Office decision of 1902 had prohibited the surgical removal of the embryo before viability in the case of ectopic pregnancy. Later theologians defended the practice of removing the tube and embryo together (salpingectomy), on the basis that this was not direct killing but analogous to removing a cancerous womb. However, while the permissibility of salpingectomy has become received opinion among Catholic moral theologians⁶⁰ it nevertheless stands in explicit contradiction to the wording of the 1902 judgement. Salpingectomy is a deliberate surgical intervention which knowingly involves removing the ectopic child from the body of the mother while he or she is too immature to be viable [*e sinu matris extrahere fetus ectopicos adhuc immaturos*]. Furthermore this operation contradicts the broader principle, enunciated by the Holy Office, that surgery is acceptable for ectopic pregnancy only if “the lives of both mother and fetus are preserved” *fetus et matris vitae... serio et opportune providendum est*.⁶¹

It may be argued that salpingectomy, while contravening the Holy Office judgements of 1898 and 1902, is permissible on the basis of Pius XII’s defence of interventions that cause the death of the unborn child *indirectly*. However, Pius XII did not address the question of ectopic pregnancy. He wisely took as the prime instance of “indirect” killing the clearer example of the harm that comes from interventions given for reasons “independently of her condition of pregnancy”.⁶² This

⁵⁸ Pius XII, Speech to the Association of large families (November 27, 1951) quoted by the Congregation for the Doctrine of the Faith, “Clarification on procured abortion” (July 11, 2009) and by Benedict Guevin, “Vital Conflicts and Virtue Ethics” *National Catholic Bioethics Quarterly* 11.4 (Winter 2011): 679-688 but not by Flannery, “Vital Conflicts”.

⁵⁹ Connery *Abortion*, 312.

⁶⁰ As noted by Flannery “Vital Conflicts” 703.

⁶¹ Holy Office 1902 quoting 1898 emphasis added.

⁶² Pius XII, Speech to the Association of large families.

description is helpful for enunciating the principle and would cover, for example, the removal of the cancerous womb of a pregnant woman, but it can hardly be argued that treatment of ectopic pregnancy is for reasons altogether “independent of her condition of pregnancy”. It is the precisely the ectopic *pregnancy* that causes the pathology.

The apparent contradiction between emergent theological acceptance of salpingectomy and a *prima facie* reading of the responses of 1898 and 1902 does not show that the former is impermissible or that the latter have no authority. Rather it seems to show that, even in the 1930s, Catholic scholarly opinion on vital conflict had developed and that philosophers and theologians had succeeded, in at least one case, in giving convincing reasons to think such an intervention was not direct killing. If the licitness of salpingectomy is regarded as probable, or even as tolerable, then it follows that the decisions of the Holy Office of 1884, 1889, 1895, 1898 and 1902 in relation to vital conflicts require very careful interpretations before they are applied to the current debate.

As there was a development in moral reflection on ectopic pregnancy even in the 1930s, brought about by subsequent scholarly debate, much more was there a transformation in the context of moral theology in the latter part of the twentieth century in the wake of the Second Vatican Council.

Recent Magisterial interventions on abortion and vital conflicts

Reference has already been made to a number of Magisterial statements on abortion in the period 1968 to 2009. The first of these is *Humanae Vitae* which condemns direct abortion not as direct killing but as an instance of the “direct interruption of the generative process already begun”.⁶³ This teaching would clearly be relevant to abortion in the central case if abortion were being viewed as a means of birth control, as sometimes seems to be the case. The applicability of this teaching to vital conflicts is in circumstances where it is precisely *generation* that is the cause of the problem, for example, where the danger is a result of suicidal ideation putatively linked to being pregnant or to the prospect of giving birth to this child in these circumstances.⁶⁴ On the other hand, in emergency interventions where the act does not have as its aim or intention destroying the nascent life within the womb or preventing the child from being born, then neither would it constitute the direct or deliberate “interruption of the generative process”. This condemnation thus also turns on whether the act involves direct killing of what is being generated.

In 1974, in the face of widespread moves within Western nations to withdraw legal protection from the unborn child, the CDF issued a document on procured abortion. This had as its aim “to recall [the Church’s] teaching in its essential aspects”.⁶⁵ The basis of this teaching is the recognition that human life is a precious gift of God and under God’s protection. This is expressed in the Divine commandment, “You shall not kill”.⁶⁶ The document reiterates the condemnation of all direct

⁶³ Paul VI, *Humanae Vitae* (July 25, 1968) n. 14.

⁶⁴ To reiterate an earlier point, it is not within the scope of this paper to evaluate the empirical evidence that the prospect of giving birth might make suicide more likely, or whether on the other hand pregnancy may be protective against suicide. The point here is only that abortion on these grounds could reasonably be construed as an intentional interruption of the generative process already begun.

⁶⁵ CDF *Declaration on Procured Abortion*, n. 4.

⁶⁶ Exodus 20:13 cited by CDF *Declaration on Procured Abortion*, n. 5.

abortion, “that is abortion willed either as an end or a means”.⁶⁷ The rationale for this prohibition is that “Divine law and human reason exclude all direct killing of an innocent human man”.⁶⁸ This prohibition has force even in the face of great difficulties which a woman might face even if it is a matter of “a serious question of health, sometimes of life or death, for the mother”.⁶⁹ According to the CDF even the most serious reasons cannot “objectively confer the right to dispose of another’s life”.⁷⁰ The use of the word “dispose” here closely echoes the earlier use of this term by Pius XII in the same context and should be taken to refer to “the direct deliberate disposition of an innocent human life, that is to say, a disposition that aims at its destruction either as an end or as a means to another end”.⁷¹

The most important Magisterial statement on abortion in recent years is *Evangelium Vitae*, in which Pope John Paul II declares that Catholic teaching on direct abortion is *de fide*. This paper has already described how, in this encyclical, Pope John Paul II defines abortion not by reference to expulsion of the child from the womb but as the direct and deliberate killing of a human being by whatever means.⁷² It is then a moot question whether or not the deliberate removal of an unborn child prior to viability necessarily constitutes “direct and deliberate killing”. If *acceleratio partus* is sometimes permissible, for example in cases where the child is viable, then it would seem that the intention to remove the child from the womb prematurely is not wrong *per se*. It is causing the death of the child that makes the act wrong. However, where the inability of the child to survive outside the womb is not part of the intention in removing it, then it would seem, *prima facie*, that the action is not *intentional* killing (though of course as an act that leads to the death of a child, even if unintended, it would require special justification without which it would be gravely wrong). If it could be demonstrated that the direct and deliberate removal of an immature child from the womb need not conform to the definition “direct and deliberate killing” then in such a case it would seem not to be included in the definition of “procured abortion” given by Pope John Paul II.

In relation to what Ballerini and others regarded as lethal attacks on the child, such as decapitation or craniotomy, it is more difficult to argue that the death is unintended. Clearly death in this case is unwanted, but where death *always* follows from certain *kinds* of acts (such as decapitation or the crushing of the skull into small pieces) then it is arguable that such actions simply *constitute* killing. In response to this move, Finnis, Grisez and Boyle argue that effects which always occur may still be unintended, and quote in their defence the teaching of John Paul II that, “by the object of a given moral act, one cannot mean a process or an event of the merely physical order, to be assessed on the basis of its ability to bring about a given state of affairs in the outside world”.⁷³

⁶⁷ CDF *Declaration on Procured Abortion* n. 7 note 15, referring to the “express, precise and numerous” statements on this matter by Pius XII and quoting the Discourse to the Saint Luke Union of Italian Doctors of November 12, 1944, “any act directly tending to destroy it [innocent human life] is illicit, whether such destruction is intended as an end in itself or only as a means to an end, whether it is a question of life in the embryonic stage or in a stage of full development or already in its final stages” (Discourses and Radio-messages, VI, 183ff.).

⁶⁸ CDF *Declaration on Procured Abortion*, n. 14.

⁶⁹ CDF *Declaration on Procured Abortion*, n. 14.

⁷⁰ CDF *Declaration on Procured Abortion*, n. 14.

⁷¹ Pius XII Allocution to Italian midwives (October 29, 1951) as quoted by Flannery, “Vital Conflicts,” 701.

⁷² *Evangelium Vitae* n. 58. Note that this emphasis on characterising abortion as “direct killing” is already prominent in Pius XI, Pius XII and the CDF *Declaration on Procured Abortion*.

⁷³ *Veritatis Splendor* n. 78 quoted in their defence by 22.

It is curious that Flannery does not cite the Magisterial teaching of *Evangelium Vitae* and the definition of abortion given by Pope John Paul II. Nevertheless, he makes some reference to Magisterial teaching subsequent to the Second Vatican Council, for he alleges that the account of action given by Grisez, and hence Grisez's account of craniotomy, is contrary to the teaching of Thomas Aquinas that underpins John Paul II's encyclical on fundamental moral principles, *Veritatis Splendor*.⁷⁴ This is an important and highly relevant teaching document and it is indeed certain that when John Paul II wrote this encyclical he was aware of writing of Grisez, Finnis and others of that school. However, it is highly implausible to construe *Veritatis Splendor* as an attack on that account of human action. Where the encyclical condemns various concepts and schools of thought in moral philosophy or theology it does so overtly using the preferred terms of the school in question. There is nothing in the encyclical in relation to the account developed by Grisez and Finnis that is remotely analogous to the pope's overt condemnation of "proportionalism".

Indeed, together with William E. May, John Finnis had been central to a paper written in 1990 for the International Theological Commission on the subject of moral absolutes which was preparatory to the encyclical. Furthermore, Grisez was involved directly in more than one stage of the drafting of *Veritatis Splendor*,⁷⁵ and, at the invitation of the CDF, Finnis and Grisez contributed an article on its main theses in *Osservatore Romano* as part of a series of articles on the encyclical.

The argument of Flannery is not that *Veritatis Splendor* was directed against the action theory developed by Grisez and Finnis. He makes the more indirect claim that the encyclical treats Thomas Aquinas as authoritative and that St Thomas's understanding of the "object" of the human act is incompatible with that of Grisez and Finnis. It is not within the scope of this paper to assess whether Flannery is correct in his claim that Grisez departs from Thomas Aquinas on this key point. What is pertinent to the argument of this paper is simply to note that, in his exposition of Thomas, Flannery goes far beyond the account given by John Paul II in *Veritatis Splendor*. Flannery's invocation of that encyclical thus functions as the introduction to a substantive discussion of the moral thought of Thomas Aquinas rather than as a direct exposition of Magisterial teaching. This shift is somewhat obscured by Flannery's assertion that the Church "would be contracting herself" were she to "put forward ideas incompatible with Aquinas's core insights".⁷⁶ Even to the degree that Flannery's claim is uncontentious, there is surely a wide spectrum of opinion, not least among Thomists, as to how to characterise "Aquinas's core insights". Furthermore, in relation to such opinions, there is good reason to think that Pope John Paul II did not wish in the encyclical to settle disputes among non-dissenting schools of Catholic moral thought but only to exclude certain revisionist approaches. The pope states clearly in the encyclical that he "does not intend to impose upon the faithful any particular theological system, still less a philosophical one".⁷⁷

Not only was the encyclical *Veritatis splendor* not directed against, nor overtly incompatible with, the approach developed by Grisez, but since 1970 there has been no Magisterial censure of theologians or philosophers of that school either in general or in relation to craniotomy in particular. Indeed, in 1992 a work of Grisez which advocated this position on craniotomy was granted an

⁷⁴ A similar claim is made by Nicholas Tonti-Filippini *About Bioethics: Philosophical and Theological Approaches* (Ballan VIC: Conor Court Publishing, 2011), 96.

⁷⁵ Grisez, Finnis and Boyle "'Direct' and 'Indirect'", 15, footnote 18.

⁷⁶ Flannery, "Vital Conflicts", 693.

⁷⁷ *Veritatis Splendor*, n. 29.

Imprimatur. This imprimatur was not withdrawn in the wake of the publication of *Veritatis Splendor* nor has it been withdrawn in the subsequent twenty years. Professor Flannery is no doubt aware of this volume as he is thanked in the preface for his helpful comments on various chapters.⁷⁸ Similarly while Anderson et al raise the question as to whether Rhonheimer's comments in relation to the Holy Office decrees "constitute infidelity to the magisterial teaching"⁷⁹ it is clear that Rhonheimer showed every willingness to submit his opinions to the Magisterium and it seems that the CDF not only permitted but actively encouraged Rhonheimer to publish his views.⁸⁰

The most recent Magisterial statement on abortion is also the one most immediately relevant to vital conflicts between mother and unborn child. In 2009, in response to the controversy surrounding a particular case in Brazil, the CDF issued a clarification concerning procured abortion. This document recalls the teaching of the *Catechism of the Catholic Church* that "Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable".⁸¹ The document also reiterates the teaching of Pope John Paul II that a woman's decision "to rid herself of the fruit of conception" is not justifiable, even for the sake of "certain important values such as her own health or a decent standard of living for the other members of the family".⁸² At the same time the CDF draws attention to the teaching of Pius XII that procedures "which would have as an accessory consequence, in no way desired or intended, but inevitable, the death of the fetus" would not necessarily constitute "a direct attack on the innocent life".⁸³

This intervention of the CDF was timely given the use of such examples by the media and even by some dissenting Catholics to undermine the Church's *de fide* teaching on abortion. However, it is important to note that neither that document nor the teachings of Pius XII or John Paul II resolve the key issue of dispute among contemporary non-dissenting moral theologians. For the issue of dispute is precisely which interventions constitute "a direct attack on human life" and which involve the death of the child as something knowingly caused but "in no way desired or intended".

Further considerations of historical context

It should be noted that the interventions of the Holy Office between 1884-1902 in relation to vital conflicts between mother and child were not characteristic of the reticence of Magisterium on this difficult question prior to the nineteenth century. To understand these interventions it is necessary to recognise the particularity of the historical context. They occurred within the period from Pius IX

⁷⁸ Grisez *Living a Christian Life* was granted *Nihil obstat* by Rev Kevin T McMahon and *Imprimatur* by His Eminence, James Cardinal Hickey, Archbishop of Washington, 16 November 1992, and was published by Franciscan Press, Quincy University, Quincy, Illinois, in 1993.

⁷⁹ Marie A Anderson et al. "Letter: Dr. Anderson and her colleagues reply" *National Catholic Bioethics Quarterly* 11.2 (Summer 2011): 208-211, at 208.

⁸⁰ Martin Rhonheimer "Letter: Vital Conflicts" *National Catholic Bioethics Quarterly* 11.4 (Winter 2011): 627-629. This same attitude of faithful submission to the Magisterium was shown by Grisez when putting forward his views in 1992: "If the analysis proposed here should lead in practice to a judgment in conflict with the Church's teaching, I would follow and urge others to follow the Church's teaching. If the teaching is open to refinements in respect to its application, these must be completed by the magisterium" (Grisez *Living a Christian Life*, chapter 8, footnote 85).

⁸¹ CDF "Clarification on procured abortion" quoting John Paul II, *Catechism of the Catholic Church* (Citta del Vaticano: Libreria Editrice Vaticana, 1993), n. 2271.

⁸² CDF "Clarification on procured abortion" quoting *Evangelium Vitae*, n. 58.

⁸³ CDF "Clarification on procured abortion" quoting Pius XII Allocution to large families.

to Pius XII where the Church adopted a highly critical attitude in response to “modern” developments occurring in a world which seemed increasingly hostile to the Church.⁸⁴

More particularly, these interventions all occur within the pontificate of Leo XIII, who encouraged a movement which was attempting to construct and defend a single overarching methodology for Catholic theology modelled on that of Thomas Aquinas. Whereas in the first half of the nineteenth century there had been a plurality of approaches within Catholic theology, even within seminaries, the latter part of the century saw an attempt to restrict Catholic theology to a single approved method. No less than the pontificates of Pius IX who preceded him, or of Pius X who succeeded him, the pontificate of Leo XIII showed a very high degree of caution about what could “safely be taught”. Declarations to this effect, while they may well have been justified in that context, need to be understood against this particular historical background.

The Second Vatican Council represented a shift away from the approach taken during the period from Pius IX to Pius XII,⁸⁵ and encouraged theologians to engage positively with the modern world wherever possible. In this new context there was an explicit acknowledgement of a plurality of methodologies within Catholic theology. This is evident in the quotation of Pope John Paul II that he “does not intend to impose upon the faithful any particular theological system, still less a philosophical one”.⁸⁶ Such a statement is in marked contrast to the prevalent attitude at during the pontificate of Leo XIII, though it would have been unremarkable in the seventeenth century or indeed in the time of Thomas Aquinas.

An interesting example of the shift of context is provided by the positive reference John Paul II makes to Rosmini in the encyclical *Fides at Ratio*, as a theologian who achieved a fruitful exchange between philosophy and the Word of God.⁸⁷ This judgement is in contrast to attitude of the Holy Office in 1887, which condemned a number of propositions taken from the works of Rosmini.⁸⁸ Subsequent to John Paul’s statement, the CDF produced a clarification which urged that attention be given “not just of the Congregation’s texts, but of their context and of the situation in which they were promulgated, which also allows for historical development”.⁸⁹ An important part of that context was comprised by the efforts of the Papal Magisterium in the late nineteenth century “to foster Thomism as a philosophical and theoretical instrument, aimed at offering a unifying synthesis of ecclesiastical studies”.⁹⁰ A fresh judgment in the current context requires “taking into account the

⁸⁴ It may be noticed that English and American state law and Catholic canon law all saw a shift in relation to abortion in the mid-nineteenth century, with the abandonment of the concept of “quickening” or delayed ensoulment. This shift seems to reflect a greater clarity about human reproduction and embryology. On the other hand the flurry of decisions on abortion by the Holy Office in the late nineteenth century were related in the first instance to emergency procedures performed very late in pregnancy and therefore seem not to be related to the better understanding of reproduction and the early human embryo. The shift seems more to reflect a post-Pius IX ecclesiology than post-von Baer embryology.

⁸⁵ Fergus Kerr “Rahner Retrospective I: Rupturing *der Pianische Monolithismus*” *New Blackfriars* 61 (1980): 224-233.

⁸⁶ *Veritatis Splendor*, n. 29.

⁸⁷ John Paul II *Fides et Ratio* (September 14, 1998) n. 74.

⁸⁸ Holy Office Decree (December 14, 1887) ASS 20, 398 ff.

⁸⁹ CDF “Note on the Force of the Doctrinal Decrees Concerning the Thought and Work of Fr Antonio Rosmini Serbati” (July 1, 2001), n. 2.

⁹⁰ *Ibid.*, n. 4.

results emerging from historiography and from the scientific and theoretical research of the last ten years”.⁹¹

In the case of the interventions by the Holy office regarding vital conflicts analogous considerations also apply. As with the case of Rosmini, the shift of context reflects the weight of further “scientific and theoretical research” among scholars faithful to the Magisterium. In relation to abortion, the period following the Second Vatican Council and *Humanae Vitae* has witnessed an unprecedented challenge to the fundamental principles of moral theology. This in turn has led to a rich discourse among philosophers and theologians faithful to the Magisterium seeking to address this challenge. Furthermore in both cases, within this new scholarly context, a new Magisterial statement in the form of a papal encyclical provides the touchstone for contemporary discussion. In relation to Rosmini this was *Fides et Ratio* (1998). In relation to abortion these are the moral encyclicals of Pope John Paul II, *Veritatis Splendor* (1993) and more especially *Evangelium Vitae* (1995).

Conclusion

The document *Donum Veritatis* makes clear that, where the Magisterium, even though not intending to act definitively, intervenes to “guard against ideas that are incompatible with these truths [of faith]” the response to such interventions “cannot be simply exterior or disciplinary but must be understood within the logic of faith and under the impulse of obedience to the faith”.⁹² Even on matter “*per se* not irreformable” the norm must be a willingness to submit loyally to the Magisterium with the religious submission of will and intellect.

At the same time *Donum Veritatis* states that the Catholic theologian “cannot pursue his discipline well without a certain competence in history”.⁹³ With this historical sensitivity comes an awareness “of the filtering which occurs with the passage of time... The theologian knows that some judgments of the Magisterium could be justified at the time in which they were made, because while the pronouncements contained true assertions and others which were not sure, both types were inextricably connected. Only time has permitted discernment and, after deeper study, the attainment of true doctrinal progress.”⁹⁴

Such a reference to doctrinal progress is also found in the Note of the CDF on the doctrinal decrees on the work of Rosmini. That Note recommends “an attentive reading not just of the Congregation's texts, but of their context and of the situation in which they were promulgated, which also allows for historical development”.⁹⁵ Furthermore, in the encyclical *Veritatis Splendor*, it is made explicit that such development of doctrine occurs also in the realm of the morality of action. “The Church has faithfully preserved what the word of God teaches, not only about truths which must be believed

⁹¹ Ibid., n. 7.

⁹² *Donum Veritatis*, n. 23.

⁹³ Ibid., n. 24.

⁹⁴ Ibid., n. 26. Whereas Marie A Anderson et al. (“Letter: Dr. Anderson et al. reply” *National Catholic Bioethics Quarterly* 11.4 (Winter 2011): 630-631) cite *Donum Veritatis* 24 against Rhonheimer on the need to submit to the Magisterium even in relation to doctrine that is not *per se* irreformable, they fail to advert to *Donum Veritatis* 26 and the necessity for a theologian to be sensitive to the historical context of the Magisterial statements.

⁹⁵ CDF “Note on the Force of the Doctrinal Decrees”, n. 2.

but also about moral action, action pleasing to God (cf. 1 Th 4:1); she has achieved a *doctrinal development* analogous to that which has taken place in the realm of the truths of faith”.⁹⁶

In regard to this doctrinal development and the “filtering” of what is necessary and what is contingent in the area of Catholic teaching on abortion, certain principles and doctrines have gained weight and authority since 1884. In particular, the Magisterium has reiterated the principle that direct and deliberate killing of an unborn child by abortion is never morally permissible, even for the sake of saving the life of the child’s mother. It is this principle, made explicit in the decree 1889 that informs the particular judgements on different procedures in the decrees of 1884, 1889, 1895, 1898, and 1902. This key principle has been reiterated in subsequent teaching documents, culminating in the encyclical *Evangelium Vitae*.

On the other hand, in relation to the particular judgements of the Holy Office in the late nineteenth century, these express a heightened degree of caution that was characteristic of the period. Grisez and Rhonheimer have also argued, with some justification, that the dominant moral theology of that time was far from clear about the relation between directness, intention, and physical immediacy. Within this context theologians did not succeed in making a convincing case that would exonerate craniotomy from the claim that it involved direct killing. The Holy Office having declared that craniotomy could not safely be taught, suspicion was then extended to arguments in favour of *acceleratio partus*, of caesarean section prior to viability and of the removal of the ectopic embryo. It may be noted that, such was its reluctance to identify as morally safe any procedure that involved or led to the death of the unborn child, every one of the *dubia* from 1884 to 1902 involving such cases was answered in the negative (the exceptions were only where the child had a chance of survival). Indeed, it is argued here, that a *prima facie* reading of these decrees would also rule out salpingectomy and other procedures that enjoyed widespread support among Catholic moral theologians even in the 1930s. The theological context created by the Second Vatican Council and by a subsequent fifty years of scholarly research on fundamental moral concepts requires that these earlier statements be re-evaluated.

With due respect to Professor Flannery, careful analysis does not therefore show that it is “very apparent... that the type of analysis that Rhonheimer [and Lysaught]⁹⁷ and Grisez adopt is... incompatible with Church teaching”.⁹⁸ A reading of the decisions of the Holy Office from 1884 to 1902 in their historical context and in the light of subsequent theological development and current Magisterial teaching shows the great difficulty of applying them directly to the contemporary debate.

⁹⁶ *Veritatis Splendor*, n. 28 emphasis in the original.

⁹⁷ This paper has not engaged with the Phoenix case or with M. Therese Lysaught’s use of the theories of Grisez and Rhonheimer. It should nevertheless be noted that Flannery understates the differences between the approaches of Grisez and Rhonheimer. To be sure, both thinkers were invoked by Lysaught in her defence of the Phoenix case (see Flannery “Vital Conflicts”, 691-692), but to label this “the Lysaught-Grisez-Rhonheimer approach” (Flannery “Vital Conflicts”, 694) is to read Grisez and Rhonheimer through Lysaught in a way that obscures important differences in methodology. It is unimaginable, for example, that Grisez would assent to the assertion that craniotomy is “exempt from the ethical context of ‘justice’” (Rhonheimer, *Vital Conflicts in Medical Ethics*, 12) or that it “falls outside the opposition ‘just/unjust’” (Rhonheimer, *Vital Conflicts in Medical Ethics*, 13). On this point see Thomas A. Cavanaugh, “Double-Effect Reasoning, Craniotomy, and Vital Conflicts: A Case of Contemporary Catholic Casuistry,” *National Catholic Bioethics Quarterly* 11.3 (Autumn 2011): 453-463, at 460 footnote 20.

⁹⁸ Flannery, “Vital Conflicts” 702.

It is not the aim of this article to defend the moral permissibility of craniotomy, or indeed of any other particular interventions which aim to save a mother's life but which involve or lead to the death of her unborn child (*acceleratio partus*, salpingectomy, salpingostomy, the use of methotrexate etc.). Its aim is rather to emphasise the importance of attention to historical context when interpreting the former statements of the Magisterium in this area. The methodologies and the particular conclusions of Grisez and of Rhomheimer may yet be shown to be deficient through theological discussion or in a subsequent intervention of the Magisterium, but at present neither of these approaches can be excluded on the basis of *overt* incompatibility with former or current Magisterial teaching. If these views are to be challenged, this must be on the basis of appeal to philosophical or theological argument, not by direct appeal to authority. In particular, appeal to former decisions of the Holy Office, and of statements of Pius XI and Pius XII, is not sufficient to exclude such approaches.